

EUNOMUS:

OR,

DIALOGUES

CONCERNING THE

LAW AND CONSTITUTION

OF

ENGLAND.

WITH

An Essay on Dialogue.

VOLUME THE FIRST.



LONDON:

Printed in the Year MDCCCLXVIII.

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DIAGNOSES

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An Essay on the

VOLUME THE FIRST

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A N
E S S A Y
O N
D I A L O G U E;

PARTICULARLY ON
The Application of that Form of
Writing to Matters of LAW.

BY WAY OF
I N T R O D U C T I O N
T O

Some D I A L O G U E S of that Kind.

*Ut in vitâ, sic in studiis pulcherrimum et humanissimum
existimo, severitatem comitatemque miscere.*

PLIN. Ep. 1. 8,

L O N D O N :
Printed in the Year MDCCLXVII.

ESSAYS
ON
DIALOGUES

PARTICULARLY OF
The Application of that Form of
Writing to Matters of Law.

BY WAY OF
INTRODUCTION

TO THE
Second Edition of that Kind.

By the Author.

LONDON:
Printed by J. B. Nichols, in the Strand.

AN
ESSAY
ON
DIALOGUE.

INTRODUCTION.

AS I would wish to remove every objection to the following dialogues that may well be foreseen, there is one that I must guard against at the outset, as it may possibly meet the reader at the very title page, arising from a seeming impropriety of the present application of the form itself.

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It will be necessary therefore, to consider this point with some attention.

The form of writing called Dialogue professedly imitates conversation, and has many advantages on particular subjects, that other forms have not. It enlivens the driest subjects; and gives an air of freedom to all: under the appearance of common discourse, it may inculcate the most useful truths; and by the different characters of the piece, is admirably calculated to remove those prejudices and objections, which few subjects are free from, especially to those who are little acquainted with them.

On this account it is, that some writers in all ages have chosen this form ; of which it is sufficient at present, to mention the beautiful remains of the Socratic school, in the writings of Plato and Xenophon ; and the charming copies Tully has left us of them, at least equal, if not superior to the originals.

Intending to consider principally the most perfect form of dialogue, I need take no notice of those allegorical sketches, left us by some of the Antients ; wherein virtue and vice are described, under feigned characters, and a more imaginary existence. Such as the

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choice of Hercules in Xenophon, and the table of Cebes, and some of the dialogues of Lucian. To which I may add (as much of the same kind) the masque so finely fancied by Lord Bacon ^a.

These are confessedly fictions of a much bolder cast, and want nothing of poetry but metre.

The perfect dialogue, tho' it comes much nearer to real conversation, has, however, a race of fancy, that puts it much above the level of common prose; if it may not be looked on as a kind of poetry. In which notion, I may shelter myself under the au-

* See his Letters published 1762.

thority

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thority of as exact ^b a judge of composition as the World ever knew: for Aristotle allows that metre will not of itself constitute poetry, tho' it may be essential to it: indeed if it did, a real history by a new arrangement of words might be turned into a poem; or Homer and Virgil by mere transposition might be degraded to plain prose. Neither of which, those who have any idea of poetry, will bear to hear.

The invention ^c and fancy are alone of the proper essence of poetry;

^b Aristot. Poet. c. 1. p. 2. Edit. Oxon. 1760.

^c Hence the very name of poet: and hence Lord Bacon, in the passage so often

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poetry; and any composition, whatever be its subject, or however it may be founded on real events, or contain moral truths, if supported, and as it were coloured over by fiction, approaches more or less to the nature of poetry. It is in this view, that real history cited, deduces the pleasure we feel in reading the sublimer poetry, vol. 1 p. 42. Aristotle, who derives this pleasure altogether from our natural love of imitation, is not however inconsistent with the other account. And tho' the cause assigned by him, is common to the other imitative arts, yet when their connection with poetry is considered, he will not be thought to have gone too far: for even Lord Bacon's reasoning concerning poetry, is in a great degree applicable to the other principal mimetic arts.

may

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may be made the basis of a good poem, provided the events are not minutely copied ; and such events as are related, are interspersed with episodes, and connected by poetical machinery. Of which kind are Lucan's *Pharsalia* ; and Shakespear's *Historical Plays*.

The form of dialogue, in the very nature of it, borrows the aid of fiction ; the scene it represents, and the characters it consists of, are pure efforts of the imagination. But as its view is to instruct as well as to amuse, the reins must not altogether be guided by fancy ; but some settled path is at least to be pursued. It must be of a
didactic

didactic as well as of a *dramatic* nature: one of these must be all along made consistent with the other. It must be in dialogue, as in a professed didactic poem. To instruct, as well as to please, is indeed supposed to be the end and aim of all poetry; but this end ought to be kept closer in view in didactic poetry than in any other. A poem wrote on this model, that fails of instruction, by not conveying useful precepts, ceases to be a didactic poem; and if these precepts are not conveyed in a pleasing manner, they had much better have been delivered in plain prose. Fiction then must

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in a didactic, as in other poems, join with truth; but with this difference, that in other poems, it is chiefly required that fiction has the air of truth; here truth itself wears the mask, and

“Men must be taught as if you taught them not.”

It is just so in dialogue: the didactic nature of it consists in teaching something by feigned characters, and in an imaginary conversation: but the dramatic cast of the work must soften the rigour of professed instruction.

Real conversation is of all things whatever the most incapable of set rules; the few observations

tions that have been left us on that subject by Bacon, Temple, and Swift, are rather hints to avoid faults in it, than means of improving it. In the various intercourse of mankind, so widely different in their temper, education and ways of life, what rules or restrictions can be necessary, but those which decency and common sense will sufficiently dictate?

Written conversation, however, has not the privilege of being so free and unconnected as that in life: dialogue, indeed, is the most free of all kinds of writing, and in that too it resembles conversation; but it ought not to resemble

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ble it, in flying from one subject to another, without any kind of thought, view or connection. When the subject is once chosen, it must be pursued, in some settled plan; or the characters in it may as well have recourse to observations on news or weather, which are the usual topics of barren or exhausted conversation.

But the essential requisites of a perfect dialogue will be better understood, if the double nature of it is a little closer considered. As a *dramatic* composition, it will require a scene and characters. The subject, whatever it is, is not to be entered on nobody knows when, where

where or why: tho' the subject itself will go a great way in pointing out a proper scene, the different characters, and form of introduction. In laying the scene, some few Moderns perhaps have out-done their masters the Antients, who dwell very little on the scenery and introduction to their dialogues. Of Tully's, for instance, the introduction to the fifth book de Finibus, and that to the second de Legibus, are most remarkable. But landschape painting itself can scarce be more picturesque than the scenery of some modern dialogues: of which Addison's

dison's and Berkley's are the strongest instances.

The reason why the moderns have been most solicitous in the scenery of their dialogues, may perhaps be drawn from considering that the whole of their's is invention. The Antients, who worked real characters into their pieces, were necessarily in some degree confined in the choice of their scenes on that account: and where they used ^d any, commonly fixed on

^d In many of Plato's, no scene is laid in the opening; as in the Gorgias, Philebus, Meno, Hipparchus, &c. and the Timæus, one of his most sublime dialogues, begins with Socrates counting his companions, and missing

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on such places for their dialogues, as the persons who composed the party were most likely to appear and converse in. And thus Plato's scenes, as well as Tully's, are strictly real, tho' he is supposed * to have embellished an Athenian shade with a plane tree or other ornament, that did not exist but in his writings. The Moderns draw their scenes principally from fancy: and in so doing have these advantages; in making them by the aid of a warm imagination, missing one that was present the day before: the first words of the dialogue are "one; " two, three; where, Timæus, is the fourth " who was with us yesterday, &c." Edit. Serran. vol. 3 p. 17.

* Cic. de Orat. l. 1.

more

more agreeable than any precise spot faithfully delineated; while at the same time an imaginary scene is best suited to artificial Characters. But whatever the Antients may be thought to want in the scenery of their dialogues, they abundantly make up for, in the occasion of them; the manner of connecting the introduction with the subject; and the plan of conducting them. Which to imitate with success, seems to be all they have left for those who come after them to hope for.

In the dramatic part of dialogue, the choice and management of the Characters are princi-

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pally

pally to be attended to. They must throughout the piece be uniform and consistent: he who in the beginning of it wants information on the subject, or comes violently prejudiced against it; is not without apparent probability to close the conversation with a victory over his own ignorance or prejudice; much less to become the wisest of the whole company in what at first he was most a stranger to. This great rule as to the consistency of character, is founded on probability; and is no other than the well known one of Horace, for the real drama.

But

But as the didactic nature of dialogue introduces the greatest limitations on the Characters, to avoid repetition, something must now be said on that head. All Dialogue (I think) proposes to inform in some measure upon some set subject ; but the writer, who proposes to inform us this way, must above all, be cautious of doing it with ostentation. Writers in common form are too apt to affect an undue superiority over their readers ; in this form it would be intolerable ; because such a conduct would be intolerable in real conversation, of which this mode of writing is a copy. Dialogue,

therefore, in the Characters it uses, is to shun the air of a lecture: the Characters must in general be of a level in most respects; and tho' it is the province of one person to take the lead on the main subject, the rest are not to be mere cyphers; they are to make their observations, propose their objections; allow what they think is justly advanced; deny, what is not. There is no occasion to add, the subject should have some importance in itself; because, who aims at teaching what nobody desires to know? The writer too ought to put his own real sentiments in the mouth of his principal person; the

the reader will then have his clue ; and he will not then impute contradictory sentiments to the writer ; since it will be his own fault if he does not distinguish the Characters ; and the doctrine from the objection :

Having sketched out this essay, and a considerable part of the following dialogues, before the republication of a set of moral and political dialogues, I was alarmed on finding by a preface then first added, that I differed so much from the ingenious author on this subject.

It must be agreed to be a point in itself of no imaginable

consequence to the happiness of life, or the cause of letters, which of us is in the right in the notion he has advanced; and so far it does not deserve even the shadow of a controversy. And yet the respect I have for a writer so justly esteemed, requires me to look a little into the difference between us: and see whether I may trust what has been said in this essay, as a defence of my plan; or whether the essay and dialogues are not at once overturned by moulding them into a form, in his opinion, “so essentially defective.”

‡ Preface, p. 16.

The

The principal (I cannot say the only) thing about which we differ, is the necessity he insists on of chusing real Characters for the speakers in a dialogue: that the choice of fictitious Characters “is
“ contrary to the practise of the
“ old writers; and (as he urges)
“ to the infinite disadvantage of
“ this mode of writing in every
“ respect ^f.”

As I will own I had no such thoughts while I was writing on the subject, my manner of treating it was on those large grounds I have already chalked out in this essay: in which I have rather

^f Preface, p. 16.

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considered the nature of this kind of writing in the abstract, as resembling conversation, than supposed any particular characters were necessary to maintain a conversation on a given subject. The disadvantage in general of introducing Characters known in history, arises from the difficulty of supporting them. The rule here is the same as in Horace.

Aut famam sequere, aut sibi convenientia finge,
 Scriptor. Homereum si forte reponis Achillem;
 Impiger, Iracundus, inexorabilis, acer,
 Jura neget sibi nata, nihil non arroget armis.
 Sit Medea ferox invictaque, flebilis Ino,
 Perfidus Ixion, Io vaga, tristis Orestes.
 Si quid inexpertum scenæ committis, et audes
 Personam formare novam; servetur ad imum
 Qualis ab incepto processerit, et sibi constet.

De Art. Poet. v. 119.

In

In copying a real character then, if the lines of the portrait do not convey a striking likeness, it will be little better than sign-post painting. It will be like the individuum vagum of the Logicians; and can no otherwise pass for Socrates, Mr. Locke, or Mr. Addison, than as they happen to resemble the rest of the species.

Besides, in some particular cases the propriety of the design itself, however well it may succeed in the management, may be more strictly canvassed. As will be evident from one of the learned writer's own instances, that of the *Minute Philosopher*; where the contrary

trary has been observed. And would it indeed have been right “in one of the best and politest of our writers,” as that author is allowed to be^h, or rather would it have been doing justice to any dead or living character, to have delivered it down to all posterity, marked as an Atheist or Freethinker by its real name? The purpose of those dialogues was to refute such notions: the purpose was every way suitable to the character and abilities of the writer. But it was to be done by arguments levelled against the cause in general: not by branding with infamy

ⁱ Preface, p. 15.

any particular person. If the person was dead, what was advanced as his notion, might have been a misrepresentation: if he was then living, it must have been a libel. Because tho' the law will punish every open insult on Religion or Government; it does not authorise any private writer to take the correction into his hands: much less will it suffer him to invert the rules of justice, and by a direct attack on a real character, to let the punishment precede the conviction of the crime.

But the case I have put indeed is a very particular one; and tho' it does result from the doctrine in general, I am aware it is by no

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means to be made an objection to the writer now before us, because he had before excluded certain subjects from the province of dialogue^k. And therefore whatever qualifications he has required in point of form, they must in that view be understood to take place only where the thing itself is supposed to exist.

Taking it however as to the most proper subjects, (as the following may be supposed at present) tho' there would have been no impropriety in these dialogues, to have brought some of our great Judges and Chancellors once more on the stage; I see no necessity for doing

^k Preface, p. 9, 10.

it, and a considerable disadvantage had it been done. It would doubtless have given the doctrine an air of authority: but then the subject itself would have been confined in one respect. The speakers could have borrowed nothing from the present times; and therefore the design would have fallen greatly short of what the subject obliged me to consider.

To this it may be asked me upon my own grounds, if this form of writing is, as to invention, a species of poetry, why not obviate this inconvenience as the poets¹ them-

¹ Homer and Virgil have frequently done it. Prior in his tale of Apelles and Protogenes

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themselves have done on the like occasion? why not speak of things known at this day only, as if they were known at the times of which you write? And this indeed the writer of dialogues on the other plan, has done more than once.

But genes has humourously obviated the objection to such anachronism's. He makes the painter of Rhodes have his hour of tea-drinking at six: and then prepares himself for the ghastly smile of a critic at such a striking absurdity.

Tea, says a critic big with laughter!
Was found some twenty ages after.
Authors, before they write, should read.
'Tis very true—but we'll proceed.

Poets often carry this fiction a great way,
as when real history is shadowed out in the
form

But the answer to their question must be my vindication. The very allowance supposed must go upon an admission, that dialogue after all, is still a fiction; and thence that liberty is assumed. And if it is a mere fiction, why all this solicitude of chusing real important Characters, under so form of a vision or a prophecy: and intreating of early times, the events of many centuries afterwards are anticipated. Of which kind every body knows the famous vision in the 6th book of Virgil; and that of Milton comprehending all scripture history. Of the same kind too is the fine compliment Shakespear has paid to his own times in Archbishop Cranmer's prophecy at the Princess Elizabeth's christening.

many

many difficulties and objections as to the manner of supporting them? The fiction is certainly more simple in the creation of a Character: and nothing is then left to the writer but to preserve its consistency. If this liberty is allowed in the more rigorous representation of human life, in the real drama, why not much more in this species of dramatic composition?

And tho' "this is not copying
"the Ancients^m," it is not the less laudable on that account. It at least gives the merit of invention which will more than balance the chance of a defective imita-

^m Preface, p. 14.

tion.

tion. And the very names of those who have shone in this kind of dialogue, will incline me to think it is too much to say, “ they have “ written beneath themselves only “ because they did not keep up “ to the antient standard ⁿ.” Nor have they by any means lost sight of the “ way which good criticism recommends ^o;” (which is nothing else but reason and common sense applied to particular subjects) tho’ they have departed from the practice of antiquity. Under those great names I shall shelter myself and leave the ingenious writer to make the most

ⁿ Preface, p. 16. ^o Ibid. p. 15

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of a spot he has so lately recovered, after it had been in his opinion lost to the world for so many ages: and which like a slip of land regained from the sea, is the proper reward of the industry that restored it.

After this long, but on my part not immaterial digression, I return to the observations formerly drawn up: and come next to consider the subjects of dialogue; which have been as various as of most other kinds of writing.

The Antients have confined this form of composition to moral subjects: the moderns have enlarged the plan; they have brought religion

ligion into it as well as morality; they have, besides considering the great art of living well, touched likewise on several other arts that tend to refine the manners, and make life pass away agreeably. Without particularly mentioning the several dialogues of different kinds, I shall content myself with reminding the reader of the most considerable names among our own writers, that have entered this list; those of Lord Clarendon, Dryden, Lord Shaftesbury, Addison, Bishop Berkeley, and some excellent writers now living, Mr. Spence, Mr. Harris, Mr. Hurd, to which I may add some of the

notat C 2 dialogues

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dialogues of the dead, such I mean, where the Characters and the subject are drawn from true history rather than mere fabulous antiquity.

There are not many subjects perhaps, that are excluded by their nature from being treated of in this manner. To say in general what are improper, we must again look back on the nature of dialogue, as “teaching by conversation.” The manner of teaching therefore, and consequently the thing taught (which will often have a manner of its own) must be such, as is not repugnant to the genius and nature of conversation.

tion. Dialogue may (indeed it ought, to) imitate the better kind of conversation; and if possible elevate the subject by the choice and formation of the Characters. But the question here is about the propriety of the subject itself.

And every body will allow at first view, any subject to be improper for a dialogue, which it is impossible to form any knowledge of from bare conversation. A dialogue for instance upon the elements of geometry or arithmetic, would be such a flagrant absurdity, that no one who has imagination enough to chuse this way of writing, will have so lit-

the common sense to pitch upon such subjects. There are indeed parts of science, closely connected with both geometry and arithmetic, that writers of character have nevertheless made the ground-work of dialogues. Of which Fontenelle's dialogues on the plurality of worlds, and Algarotti on light and colours, are well known instances. But then these sciences being conversant about common appearances; such appearances as strike the senses and captivate the imagination, when enriched by description, may very well be selected from the mass of diagrams and demonstrations with which they
are

are blended in a system, and thus a great part of these sciences may be worked into very pleasing dialogues; tho' the sciences themselves can never be thoroughly understood on such easy terms. It is much the same in a didactic poem; science can never be taught in a poem, because the air and formality of science must be dropped in a poem as much as in a dialogue. The latter indeed, as to the rule of probability, is more strict than the former; (and in that respect resembles the old rule of dramatic poetry) because it ought to have such a subject and be so conducted, that it may not seem

improbable to be communicated and understood in a single discourse: whereas a didactic poem is not confined at all in point of time.

Some subjects then are of so abstruse a nature as to be unfit for conversation pieces; others are of a nature too trifling for composition. But of this kind writers and readers must judge for themselves.

The subject of law in general steers very happily between these two extremes. Its connection with morality; its being what every body in society must live under, and consequently know something of, will

will always make it an interesting and not a difficult subject for conversation. And this propriety which stands its ground in the eye of reason, has an additional support from very early example. The treatises of Plato and Tully of this name, are still extant to vindicate the assertion.

The law of England too, so very liberal and diffusive in its nature, will scarce be disputed to afford many entertaining and instructive topics of discourse. One reason to recommend this way of writing upon such subjects, may be drawn from a circumstance to which law and dialogue have
equally

equally a relation, that of “argument,” by which I mean the exercise rather of a natural than artificial kind of logic.

It is no small excellence of conversation to make use of this: without this it must degenerate into dry narrative or bare matter of fact. Repartee is the life of dialogue; and this is a form of argument as much suited to the genius of conversation, as the Enthymeme is to the best pieces of eloquence; which for that reason was called by Aristotle the oratorical demonstration, ^P as containing a just form

^P ἔστι δὲ ἀπόδειξις ῥητορικὴ ἐνθύμημα

... τὸ δὲ ἐνθύμημα συλλογισμὸς τις.

Rhet. 1. 1. c. 2.

of

of reasoning, and easily reducible to the most perfect syllogism; but at the same time without its fetters or parade. What I have said in this light of repartee as the great ornament of discourse, can never be understood of a common, tho' improper use of it, both in life and writings; the mere art of refining upon words, and torturing them into so many different senses in the most trifling attempts to wit; this at best rather deserves censure than imitation: its very excellence often proceeds from shallowness, as Lord Bacon has observed¹; as rivers, the less they are deep, the

¹ Essay on Conversation.

quicker

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quicker light reflects from their surface. A wit of this kind (like an echo) will for ever have the last word, because he is unable to have the first.

— nec reticere loquenti

Nec prior ipsa loqui didicit.

But the Repartee that is founded on sentiment is a closer kind of argument: and besides the instances of this kind to be met with in the most improved conversation; there are many scenes in some of our best comedies that shew it in great perfection.

It being admitted then, that real conversation, and consequent-

ly dialogue, the copy of it, is often argumentative; and with great propriety; it will be hardly questioned, whether law is of that complexion. Some sciences are in their nature addicted to speculation and retirement; like some plants that flourish only in the shade. Horace would have us believe all writers are of this cast.

— nemo ac fugit urbes
Scriptorum chorus omnis amat.

But our Profession must be learned, as it must be practised, in a crowd, and among the “busy hum of men.” It is (as the wise Scriblerus observed of logic) a “polemical
“cal

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“cal art, that can no more be
“learned alone than fencing or
“cudgel playing.” It has a more
particular relation to logic than any
other art; if it is not one con-
tinued practice of it. And it was
no great satire (however meant
as such) to call^r the learned in it,
“answerers by Profession.”

Besides what has been advanced,
drawn from the argumentative
genius of law, to recommend dia-
logue on the present occasion, the
easy manner in which many points
are capable of being explained by
deductions from plain obvious prin-
ciples; the fondness with which
it is observable any news of that

^r View of Lord B. Philosophy.

kind

kind is always entertained in real conversation; the practice of furnishing several humorous scenes in comedies^s from this source, and above all the public manner of distributing justice in this country; all taken together may justly suppose something of law to be so

^s As in Shakespear's Henry the Fourth, and the Conscious Lovers. Wycherley's Plain Dealer is so remarkable an instance of this, as to be faulty through the excess. One of the most striking characters in that piece, and a female one too, is so great an adept in law, that I fear the humour of the character, which is truly great, can hardly be thoroughly relished by any but lawyers; tho' it is but justice to add, that this character has the greatest advantage from the representation of it, at this day.

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well understood as to be no improbable subject for dialogue.

In saying which I must be understood to vindicate the propriety of the subject in general, by no means to insinuate, that a dialogue on this (or indeed on any other) subject, will be equally level to all capacities. Those who are bred to the Profession, will unavoidably have some advantage; but the less technical the style of a dialogue is, the more proper and perfect it will be in that respect.

On the other hand, it is some degree of credit to ^{the} study of the law, that it is susceptible of so mild and engaging a form: it is
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an easy answer to those imputations our law is too often loaded with, of being at best a dry study; and in the opinion of many a mere jargon of different languages.

I scarce know any thing that can more effectually wipe off this stain, than a view of the great variety with which our best writers have treated on law; each in a manner agreeable to the subject, tho' each has set it in that light his own imagination directed.

To pass over those funds of knowledge so copiously diffused in reports, systems and abridgements; the best original writers

D

(whom

(whom alone I shall regard at present) on the subject of law, may be classed in several sorts.

1. That of commentary on some text-law; of which sort are Lord Coke's Institutes, Fitzherbert's *Natura Brevium*, and the antient readings on statutes.

2. That of treatise, on the law in general, or on some particular subject; as that great standard of Littleton's, those treatises of Finch, Perkins, Lord Coke's on copyholds, Lord Hale's history, and indeed most others.

3. That of expatiating "on maxims of law;" that is, unfolding those principles of law, that

that hold in so many cases as to obtain the place of axioms; like the aphorisms of other sciences. Lord Bacon seems to be the first and principal writer that has used this way: and it is in its turn a very valuable one.

4. The method of proposing queries, as those of Mr. Noy and the book under this title, supposed to be Plowden's[†]. This method has its use as being the opinion of great men in points that have occurred to them in study or practice, and are not determined by any judicial authority.

[†] Athen. Oxon. vol. 1. p. 176.

5. The last method of writing law that occurs, is that of dialogue.

The preceding method of putting queries, and inserting resolutions immediately, if the objects of those queries were undetermined points, and consequently not settled law (as I have considered them, and) as the term seems to import, might be considered as the first rude form of dialogue. Tho', if there is any foundation for what has been said, a dialogue consisting merely of question and answer, is extremely imperfect; and little more than a catechism. It is "dactic,"

“ dactic,” just as other treatises are; but has nothing “ dramatic” in it; no diversity, and at the same time constant peculiarity of Character, which are of the essence of perfect dialogue: the parts in it are no other way distinguishable than by the mere initial letters, or the bare question and answer. And yet of the few specimens the law can boast of this kind of composition, this imperfection is but too visible.

The most ancient piece of this form, is the dialogue de Scaccario, of which there is a transcript* both

* See the Dialogue in Mad. Hist. Exch.

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in the Red and Black Book. The next in order of time, is that of Fortescue's *de Laudibus Legum Angliæ*, wrote at Berry, in Hen. 6. time: that of L. Chancellor More's, in Hen. 8; that of St. Germain's, called Doctor and Student, wrote before 1640 in the reign of the same king. A dialogue on Juries, supposed to be Sir J. Hawle's, wrote in K. Will. time, little more in form than question and answer; and the best part of it in substance, little more than an abstract of the resolution in Bushel's case.

I have, however, the greatest doubt, whether Sir Thomas More's two books of the best State of a Republic

Republic, and of Utopia, ought at all to be classed among this species of writing. Admirable as they are for the purity of the style, and the vein of fancy that runs through them; they are certainly not properly dialogues: at least they are of a very anomalous form. It is true, they have a scene and Characters; but those Characters are very faintly drawn: they seem a relation in company rather than a conversation; being chiefly a continued narrative, without any kind of interruption from the audience.

Of the other dialogues mentioned, there are but two that

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have done any justice to this form; those of Fortescue and St. Germain. I shall just make an observation or two on them, without minutely comparing them with those rules that have been endeavoured to be laid down for perfect dialogue.

The author of the set of dialogues called the Doctor and Student, is happy enough in the choice of his Characters, and the assignment of the part that each is to sustain. A dialogue between one who had no acquaintance with law, and one who was to teach it, would have soon disgusted a reader of skill and judgment;

ment ; and none but a person of skill and judgment could have relished it, if the characters were so exactly balanced as to have equal knowledge of the subject. He has more happily blended his light and shade. A student of the laws of England undertakes to explain to a doctor of divinity, the general principles of the English law, as well as several critical points therein : the Divine, skilled in sacred, as well as natural law, is desirous of being instructed in the municipal laws of his country : the Student, qualified to give this instruction, is ready to receive it in other points which lay more within

within the province of the divine. This art of the writer, in laying out his Characters, gives him an opportunity of shewing in many instances, the union between law and conscience; and of reconciling them in many cases, where they seem to be opposite. I may observe by the by, the reader of that book will find "conscience" used in two different senses, in both of which it stands opposed to "law". 1. In all those cases, where there is a right in point of justice, but no legal remedy to pursue it. As for instance, where the recovery of a just debt is barred by the statute of limitations:
there

there can be no doubt, in such a case, but that he who owes the money, ought to pay it, and will ever remain bound in conscience to pay it, tho' the law, for very good general reasons, beyond a certain time, will not enable the creditor to recover it. 2. "Conscience" is often used by this writer for a remedy in a court of Equity; and in this sense, many of our best writers have used it. Lord Bacon in his famous reading^y, tells us — "tho' an use be nothing in law to yield remedy by course of law, yet it is somewhat in reputation of law and conscience

^y On uses, in tracts, p. 6.

" For

“ For that may be something in
 “ conscience, which is nothing in
 “ law.” Where it is plain, by
 conscience, he means remedy by
 subpœna or suit in Chancery. So
 Finch²—“ this use was accounted
 “ nothing at the common law;
 “ but as matter in conscience and
 “ in Chancery only.”

But Fortescue's dialogue is of
 all others the most perfectly dra-
 matic. His Characters are of the
 highest order, and the discourse
 exactly suited to his Characters.
 He has put the principal prejudi-
 ces against the law of England,
 in the mouth of the Prince: and

² Law, b. 2. c. 2. p. 96.

answered

answered them in his own great Character, so fully, that the Prince owns his mistaken notions; and becomes an entire convert. By this conduct the noble writer has avoided a slavish panegyric of the law on one side, and on the other hand has not left the reader in doubt of the true opinion; for which some of the Antients have been justly censured.

The great outlines of this performance seem to be a preference of the common law of England to the Roman Civil Law, on a fair comparison of some principal doctrines: and in this respect Fortescue deserves much commendation

dation himself, as he was combating a very unconstitutional attempt of the then reigning favourite to bring in the civil law^a. There are several lighter traits of value to the Profession, as to some points, where time has made this writer an Antiquarian, as well as where he explains the grounds of some of our modern practice. But I must add, that in general he has observed that strict propriety of Character, as hardly^b ever to launch into his subject beyond the comprehension of one not bred to the Profession. This dialogue was

^a 2 Inst.^b p. 128, 129. c. 53.

seem the only exception.

wrote

wrote in Latin as well as the other ; neither of them with any beauty of style ; the translations of both are in the Old English, the latter is done with much less fidelity than the former.

Having entered at large into the nature of dialogue, the subjects it admits of, and shewed that law, particularly the law of England, is no improper subject for this form of writing ; and having made some remarks upon the few compositions that are to be met with on this subject, I am now come to the most disagreeable part of my work, to say something of the following dialogues.

64 *An Essay on Dialogue.*

The last dialogue on the English Constitution, is on account of its subject to be considered as the principal of the three. The Constitution being founded on law, and intimately connected with it, it was impossible to be silent on that head. The two first dialogues are employed chiefly on that topic. The first to give a more elevated idea of our law, than, I believe, is commonly entertained; tho', I confess, a much fainter than it deserves. The second dialogue is taken up in answering some plausible objections to several branches of it; such as are still echoed from one person
to

to another, without the least candour or attempt to enquire the truth. I hardly need intimate a restriction to the reader's judgment, that I am not to be answerable for all that is advanced in these dialogues, when I declare my own sentiments are put into the mouth of Eunomus.

The subject of the last dialogue, tho' of such general concern, is of all others the least touched on by our writers. I will not say it is better known to Foreigners, but (by comparison with their own) they have been much oftener led to commend the excellence of the English Constitution

It is remarkable that one of the best & most popular works on the English Constitution, is written by De Lolme a native of Geneva.

tution. However, it may be added, that excepting one treatise afterwards mentioned, I know of no one book that gives any thing like a general or true idea of it. At one or two periods of time, large volumes were written about the origin and nature of civil government; (which, however, has been miserably distorted in its turn) and we meet with some fanciful excursions about ideal commonwealths, and perfect models of government: the writers all the while not knowing, or disregarding, that degree of perfection that existed in their own: possibly as much as a real government will
ever

ever admit of, when the administration of it is in exact conformity to the principles on which it is established.

It does not fall within the business of the historian or lawyer, as such (confined to their own subjects) to give a just and full portrait of the Constitution: it must be performed however, from the united result of law and history.

And this, perhaps, is one reason why no just draught has been given us. Fortescue's dialogue above-mentioned, is so closely confined to the very letter of its title, "the Laws of England," that it says

scarce any thing of its Govern-
ment.

The other book (I alluded to)
does indeed give the most ample
view of both, that are to be met
with in any one treatise: and yet
the book itself, tho' formerly quo-
ted on great occasions, seems at
present so little known, that it
will be necessary to explain myself
by saying it is Sir Thomas Smith's
+ Republick of England, that I am
now speaking of. Perhaps it may
not be amiss to give some little
account of the author as well as
of the performance.

And here I must premise, that
the fairest way of considering any
ancient

ancient writer of law, is not to view his performance altogether with the eyes of the present age, as the law now stands; for our best writers, removed an age or two back, nay, even laws themselves, will not stand that test. Above half of Littleton's famous book is obsolete; and a great part even of Magna Charta is become a dead letter. Nor yet is it fair to compare them with those, who have wrote long since; and are now esteemed the best writers on the subject. The only proper way is to consider them as to the time in which they lived. And in this light, if Sir Thomas Smith's

work is of little regard, compared with what may be picked out of the writings of Lord Coke or Lord Bacon : we must remember, when Sir Thomas Smith wrote ^d, Lord Coke was scarce called to the bar, and Lord Bacon was but four years old.

But if his having lived first was his greatest merit, it would be very little indeed. He has touched on many points not within the common subjects of Lawyers ; and has, on many occasions, explained himself more to the general apprehension, than those who ad-

^d Ann. 1565. p. 272. Rep.

here

here too much to technical language.

He was qualified by education and experience to do justice to his subject. He^e was a very learned man, long a member of the uni-

^e Sir Thomas Smith travelled when young at Hen. 8. expence; afterwards had the Professorships of the Greek Tongue and Civil Law in the University of Cambridge; was Secretary of State to Ed. 6. and in high employments at home and abroad (during one of which he tells us this book was written, p. 273) under Q. Eliz. See Wood's Athen. Oxon. vol. 1. 302. Digge's Ambassador contains several letters and instructions to him. And there are, it seems, still extant in MS. in the Harleian Collection, some political discourses and letters of his. See Catalogue, 660, art. 35. 260, art. 100, &c.

versity, and a great courtier: and had served his country both at home and abroad in several important stations. And when with all these advantages, he had opportunities of seeing the policy of foreign countries, he had the honesty; from a just comparison, to prefer the Constitution of his own.

He has with the same advantages answered many of those little cavils against the law of England, which those who live under it, unmindful all the while of its blessings, and ignorant of the severity of other laws, are ever so fond of raising. And tho' bred

bred to the civil law, he seems to have acquired an intimate knowledge of the common law; and its valuable peculiarities ^f.

But this book, precious as it is, on account of its early production, and its intrinsic merit, does not go so far into the subject as one could wish. After stating, with some precision, the nature of the legislative and executive powers in our government, it is chiefly employed in describing its legal polity, with respect to the distribution of courts of justice, and the several modes of tryal.

^f See B. 1. c. 37. B. 2. c. 3. c. 8. c. 12. &c.

To come to the present dialogue, there are, I think, other considerations than the silence of any ancient author, that at this time would recommend a more minute description of the Constitution: I mean the growth of the Constitution itself.

For tho' in the most early ages that history carries us back to, its freedom appears to have been of its very essence: and tho', like the seed of a plant, or an infant just born, it was at its first existence perfect in its nature, as to the formation of its essential parts; yet time only could dilate those parts to their proper size and
2 compass;

compass: time only can bring government to its full strength and maturity, as it does a plant or an animal. Nothing in its infancy can exert those powers that are the end of its creation.

And what a pleasure it is to a cultivated mind, in the study of politics or of nature, to trace things in their progress; to contemplate the accidents they have escaped; the helps they have received; and the means by which they have imperceptibly arrived to their present growth?

This view, one might imagine, would be remarkably pleasing and instructive as to our own government,

ment, pursued through its several periods.—To see it, after so many shocks, advancing each century still nearer to perfection, by the concurrence of a thousand events which time alone could disclose. To see it, at length, arrived to that just equality in the distribution and exercise of power, that for so many ages it was an entire stranger to; that at present other nations can only envy; and that we, who enjoy it, can only wish may be fixed and permanent.

All this would recommend the design of that dialogue, if the execution could but in any degree be answerable to the design.

Upon

Upon the whole, I am far from pretending that this form of writing is the best way of being acquainted with the subjects contained in these dialogues; much less, that the present are the most pleasing subjects for this form of writing. It is sufficient for me, if what these dialogues contain has weight enough to send any of my readers, who before were strangers to the subject, to those great authorities, the fountain head, from whence such learning flows the purest: and that this mild and engaging form is not improper for the subject itself.

I shall

I shall then, with the vanity of an author, compare myself to one who in his travels over a bleak and dreary country, has picked up some plants, which he afterwards transfers to some delightful spot, in a milder climate : where their novelty at least may make them admired even among more agreeable productions, by those who would never have visited them on their native soil. And if after all they should have any medicinal virtues useful in life, they will be welcome wherever they can be made to grow.

Oct. 28. 1763.

P O S T-

POSTSCRIPT.

NEAR four years having passed since the writing of the essay, I am under a necessity of taking notice of some alterations that time has made as to part of the subject of it; in rendering a material observation unsupportable, which at the time it was advanced, was, I apprehend, strictly true. I ventured to assert^s, “that except-
“ing Sir Thomas Smith’s treatise
“of the commonwealth, I did
“not know of any one book,
“that gave any thing like a ge-

^s p. 66.

“ neral

“ neral or true idea of the Constitu-
“ tion.” Whoever has any doubt
of the justness of this observation
at the time it was made, will, I
hope, in weighing it in his own
mind, take the whole of the pro-
position together: and give me
leave to explain myself by saying,
that the few things that have been
given us on this subject, have con-
sidered it in some particular light
only; the writers in their several
pieces having employed themselves
either in vindicating the freedom
of the Constitution at different
periods, without describing the
particulars on which it is founded;
or else have been altogether at-
tached

tached to the consideration of the legislative branch in exclusion of every part of the administration. Since the date of the essay, this part of it, I am glad to say, has been contradicted; some ingenious works having been communicated to the public, that have served to make us better acquainted with this important subject, than we could be from any thing extant before; and which have either collected many materials into a narrow point of view, the better to enable us to form our judgment; or have by their own skill drawn the most exact outlines, tho' they may not have finished the piece.

F

I must

I must beg leave to point out the particulars I allude to, more by way of explaining my meaning, than in the least to suppose, what I shall mention are not sufficiently known.

The first in order of time, and the second in no respect, was an *Affize Sermon, preached at Durham*, and printed in 1764; and which, in the compass of two or three pages, contains, tho' in miniature, a masterly sketch of the Constitution. But I am almost precluded from saying, even this with any propriety of the performance itself, as I am well aware the very name in the title page is an ample

ple certificate for its character in the learned world.

In this review it is impossible to pass over unnoticed, the tracts that have been published concerning *Spiritual and Temporal liberty*: when I say of them (what most likely will be allowed by every body that has looked into them) that they contain a great deal of learning, extensive observation, uncommon candour and good sense; I must venture, as to the tracts on *Temporal Liberty* (with which alone I am concerned) to differ from the Editor in thinking they were left finished for the press; as I am apt to imagine

84 *An Essay on Dialogue.*

some passages would have been corrected on more mature reflection. And it is not improbable that many of the quotations, which take up more than their share of room, would have given way to reasoning upon them: and the whole have been digested in a different order from that in which they now appear. But as it is, the subjects of the tracts are well chosen; and the book is a valuable legacy to the public.

The next thing of the kind I shall mention, is a book as extraordinary in its form, as it is instructive in its contents: and which in a comment on a single writ, conveys

conveys a great deal of knowledge of the Constitution. *Sir Bulstrode Whitlocke's Comment* has all the profusion of his master Coke, with much more method. And tho' not a single word escapes him; yet his work will scarce be censured as tedious or prolix. I cannot help remarking the different effect, in this respect, such a comment must have on a reader, from what we observe in some of the most famous on Virgil or Horace. Here from a dry confined text, the mind is conducted to the deepest recesses of law and antiquity: in the other, while it is enraptured in contemplating the
most

most agreeable scenes that the genius and fancy of the author can paint to the imagination; his commentator would abruptly force us to turn aside, and enjoy with him an elaborate dissertation on a point or a particle. And if the Muse, like another Sybil, did not rescue us from their importunity, we might say of such commentators,

... Omne datum traherent per talia tempus,
 Ni comes admonuit breviterque ad fata Sybilla est,
 Nox ruit

Such a one, where his power prevails, has the art of making the finest descriptions vanish from the mind, and leave only a word behind: our commentator, on the
 other

other hand, makes a bare word introduce us to the knowledge of the most important things.

In the preceding instance, the attention is as it were surprized into knowledge. In the next work that remains to be spoken of, tho' at the first page great expectations may be raised from the design and credit of the writer, they must be more than answered in going through the book. For, if in a course of academical lectures, the justest view is given of the laws, with their history; and of the Constitution of this Country, I do not know a more emphatical application of the Grecian fa-

88 *An Essay on Dialogue.*

ges with, “to teach young persons
“in the early part of life, what
“they may use when they are
“men,” than the *Commentaries*
give us, that have in part appeared:
which in the same proportion as they are a security for our
entertainment in what is to come,
make us expect it with more impatience.
If any body can have an objection to this work, it must
be myself; for I find myself partly
in the condition of Dr. Middleton,
who was told “his book had been answered twenty years before
it was published.” Mine has laid
by till it ceases, in a great measure,
to be what it was intended
to

to have been. The third dialogue, as to some material parts of it, has been anticipated by the performance now under consideration, and in such a way as to leave me much in doubt, whether my manner of saying things will atone for the want of novelty in many places. That dialogue, which at the time of writing it, I considered "as the principal of "the three," is now, perhaps, become of the least consequence; and must, if any thing, depend principally on its form. The other two I may still look upon as more strictly my own, both in matter and form; tho' I confess

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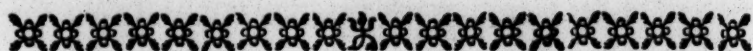
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this with a great mixture of diffidence and partiality. The latter, tho' it will not suffer me totally to destroy these dialogues, the result of so many hours amusement, yet justly recommends confining the publication to a few: the other tells me how much I must be indebted to the candour even of those few, for letting them pass without censure or disregard. When I compare the subject of them with the execution, the least I can do is to adopt the modest way in which the Grecian Artists owned their celebrated pieces of sculpture, who expressed themselves in a mode of language implying

plying imperfection, intending thereby to shew they were about such a Statue, rather than that they had in any degree finished it. How much more does it become me, tho' I should allow that at such a time "I was writing," to disclaim all pretensions "of having written, dialogues on the Constitution."

April 14, 1767.

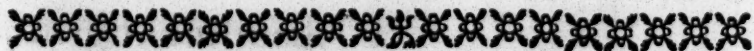
being impetuous, intending
themselves to show they were about
to do a better matter than that
they had in any degree finished
it. How much more does it be-
come me, then, I should show that
at such a time "I was writing,"
to obtain the protection "of
"having written" dialogue on the
"Confession" of a writer.



EUNOMUS;
OR,
DIALOGUES
CONCERNING
The LAW and CONSTITUTION
of ENGLAND.

DIALOGUE THE FIRST.

Mira enim Persona induci potest Britannici
Juris consulti. Hæc Ego non Rideo, quamvis
tu rideas. Cic. Fam. Ep.



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EUNOMUS;

OR

DIALOGUES

CONCERNING

The Law and Constitution
of ENGLAND.

DIALOGUE THE FIRST.

Mis enim Personam induci potest Britannici
Jura consulti. Hæc Ego non Rideo, quamvis
in ridens. Cic. Fam. Ep.

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EUNOMUS.

DIALOGUE I.

§.1. **I**T was one of those agreeable mornings in the spring, when the sun cheers the whole face of nature; the blooming state of plants, the fresh verdure of the earth, the soft air, and music of the birds, naturally tended to transfer a serenity to the minds of all that admired them. Induced by these charms, Policrites set out on a visit to his friend Eunomus, who was situated in a pleasant village, at a few miles distance in the neighbourhood.

Upon his arrival, he was introduced into the study, where Eunomus gene-

rally retired after breakfast to consecrate the most valuable hours in the day, to the improvement of himself. The study itself, by its situation as well as its furniture, was well contrived to answer this purpose. It was built on an elegant model, in a garden, at some distance from the house : from which it was shaded by a tuft of trees, and was open to the river, and a fine prospect arising gradually from the bank on the opposite side. These advantages, besides affording Eunomus a retreat fit for contemplation, gave him likewise a most agreeable relief from the fatigue of it. A person of his education, and enlarged notions, could never want the means of converting such opportunities into an elegant amusement ; and making art contribute to set off nature. He had in the course of his studies acquir-

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DIALOGUE I. 101

ed a taste for natural philosophy, and was provided with many of those instruments it furnishes; and which under its directions procure so many beautiful images to extend our reason and enrich the imagination. Eunomus, indeed, being bred to severer studies could use employments of this kind only in the intervals allowed him by his Profession. But he never was of opinion, that the study of his Profession was inconsistent with these or any other pursuits held in subordination to that; but rather seemed to think, that a man was capable of being a better lawyer by being in some degree a philosopher or a divine.

After the usual compliments passed on both sides, the two friends entered into various topics of conversation. Policrites casting his eye upon the table, among other books, saw the

Odyſſey of Homer opened in that part, where the diſcovery of Ulyſſes to his aged father is ſo pathetically deſcribed.

The affecting ſtrokes of that page, ſays he to Eunomus, which I obſerve has lately engaged your attention, remind me of the loſs I ſhall ſuſtain, by being now obliged to quit thoſe enchanting ſcenes of fancy for the dry and intricate paths of law. I wiſh the poets had leſs power of captivating the imagination, or that their power was attended with leſs fatal conſequences to the deeper parts of learning. The ſoil of Parnaffus, I am ſure is barren, however pleaſant the air of it is. But why ſhould I blame the poets in particular, when other arts tending only to poliſh and refine the manners are ſubject to the ſame imputation? Thoſe who are addicted to this Profeſſion, ought to give them
all

all up; or at least must allow, that by retaining their fondness for these, they retard their progress in that. They occasion the loss of much time; and at best are things, with which the study of the law has no manner of connection.

EUNOMUS.

§. 2. I admire your honesty (replies Eunomus) rather more than your zeal: your former passion for the liberal arts I perceive has not restrained you from thinking freely of their real value; nor has the fondness, which you observe I still retain for them, hindered you from delivering your thoughts on that subject with the same freedom to me. It must be confessed you speak the sense of a large party, who have ever looked upon the black letter in the old Reports and Statute Books as a

H 4

kind

kind of spell on the understanding: or, in a more familiar phrase, as if lawyers had entered into a recognizance to talk and think of nothing but law; and that on pain of forfeiting all skill in the Profession. I am glad, however, that you have taken the cause into your own hands: you will labour more in its defence, and not rely on numbers of your side instead of arguments: or, as too many advocates would do, oppose the weight of a multitude of bad precedents to the clear dictates of common sense.

I am persuaded (for my own part) that all arts and sciences have some kind of connection with one another; and that "Law," as one of these, is not, as you seem to represent it, like one left on a desert island, and shut out from all society. But that there is a mutual intercourse and assistance constantly

DIALOGUE I. 105

stantly kept up between the law and other sciences; the first by protecting the latter, and the latter by the various lights and illustrations they afford in the study of the law.

POLICRITES.

§. 3. Your conclusion is obvious; and it will be little to my honor, if I don't stop it in its career, by weakning the premises from whence it is deduced. Before I enquire into this connection as a fact, I wish you would explain what you mean by so vague a term. And in the course of your argument, I shall expect you to shew, not only that in the reason and nature of things this connection between the arts and sciences subsists; but that there have been some, so far advocates for the reason of things, that they have made themselves illustrious examples of this union: and not turned
all

all the rest of the arts and sciences out of doors in favour of one, either thro' partiality; or for want of room in the understanding to receive them.

EUNOMUS.

I should not be unwilling to undertake this task so much upon any apprehensions of defect of proof; as of too great a demand on your patience in attending to so copious a subject: especially to my inartificial manner of treating it; which, however, you may partly thank yourself for, by attacking me so suddenly, and totally unprepared for an exact defence.

§. 4. Your calling upon me at the outset for the definition of a term, that both in itself, and in this application of it, must needs be so well understood, looks as if you was not very confident of success in the merits of your cause; and so intended to take advantage of
every

every little slip in point of form. Your once admired Tully at least supposed what was meant by this connection to be known; and he supposed (more than you will allow me at present) that it did subsist: otherwise it would have been a useless topic in defence of his Archias. You remember what Pope as a poet said to Jarvis as a painter; and the illustration they mutually gave to each other's studies, "by art reflecting images to art." And certainly the imitative arts not only as having often the same objects in view, but as being alike dependent on the imagination, must necessarily be capable of assisting each other. The very rules of judging of the works of different arts are often the same; and from this resemblance it is that forms of expression, properly belonging to one, are applied in treating of another.

In

In short, this resemblance is in a great measure the ground of metaphorical language. To this we may add, that arts themselves often invade each others province, by imitating what one would, without examples, imagine to be the peculiar objects of the other. In proof of what is here advanced, how can we else account for those constant comparisons with sculpture, painting and music, to be met with in Aristotle, Tully, Horace, Longinus and Plutarch, while they are treating of the works of orators and poets? Has not Addison in his travels abundantly proved, that the statues and marbles he met with, are best illustrated by descriptions of poets? And, that in points of antiquity, the remains of ancient artists are inexplicable without comparison, is evident from a thousand instances: before I will permit you to
decide

decide against me, you shall at least read over Addison's Treatise on Medals; and the Polymetis, wrote on a larger plan. And tho' I was not to prove the immediate connection between any two particular arts, yet I hope you will allow me to infer a connection between the extremes, If I can prove to your satisfaction some intermediate art is equally useful to others seemingly disjointed and independent. To prove them in any degree auxiliary to the principal, will I think be abundantly sufficient to recommend them.

POLICRITES.

§. 5. I sit listening with some uneasiness for fear of turning sceptic: your argument seems to take in the whole circle of sciences; all are necessary at this rate to be attained; and if I cannot master them all, I shall be
 + allowed

allowed to understand none. I expect presently to be told I can be no lawyer without knowing that the angles of a triangle are equal to two right ones: or that the property of a field cannot be disputed in Westminster-Hall, but by those who know how to measure it. Merchants, upon more than one occasion, have told us that lawyers are improper judges of mercantile controversies; and the same incompetence has, you know, been insisted on in favor of ecclesiastical jurisdiction, and in exclusion of the common law.

E U N O M U S.

§. 6. Not to mention that your objections have anticipated my argument, and therefore I shall take no particular notice of them, now; they all go upon a grand mistake — by supposing that a lawyer, to judge in any case that

comes before him, must be an adept in the several arts of his clients; and that he cannot determine the right in question, without he understands the practice of the trades from whence it arises. But I may even refute you in your own instances; by desiring you to recollect a passage in Xenophon, where Socrates recommends Geometry and Arithmetic as a general part of education, but is far from approving of his scholar's exploring the mysteries of either of those sciences. Or to put you in mind of a later authority—but I desire no authority may extend beyond the reason of the thing: for I mean to obtrude no notions under the sanction of a great name; but still in justice to the authors, when I borrow the argument, I ought to tell you from whence; and I remember the time when an opinion of Socrates or Locke, tho'

tho' it had nothing new in it, would weigh more with you, than if it had been a truth silently acquiesced in by all mankind.

§. 7. Mr. Locke would scarce have mentioned geometry in a treatise of education, unless, in his opinion, some acquaintance with it, was of general utility. What that utility is, he has hinted more than once in a more perfect work, and on a more weighty occasion. Not less than the powers of the mind are interested in their researches into Geometry and Algebra: and I think he has very forcibly explained himself on this head, by saying, that he recommends these "not so much to make men Mathematicians as reasonable creatures."

P O L I C R I T E S.

I know not then whether Mr. Locke would not have had above half

the Earth converted into a madhouse : for at his rate of thinking, one sex, I believe, must be void of reason, and many of the other could make very little pretensions to it, by not producing a certificate of their having solved a problem in Algebra. I must own he would have made a very loyal subject in Swift's kingdom of Laputa.

EUNOMUS,

Your raillery is, but ill pointed at Mr. Locke ; and the honors you would confer on him in that respect seem but very little deserved. His skill in these sciences was far (I believe) from that of an adept ; and indeed much less than he proposes, will answer the purpose for which alone he recommends them. For the attention to be acquired by these studies ; the perspicuity and just form of reasoning for which they

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are

are so deservedly commended; and which they will imperceptibly communicate to every one that is at all conversant with them, may (I will venture to say) be learned as well from the first book of Euclid as from the six first. But when I allow with Mr. Locke, and the author of the Analyst, that Geometry is an excellent logic, I I would by no means exclude logic properly so called: nor would I attempt to insinuate, that a figure in the literary world might; not sometimes be made without the knowledge of either. They are both confessedly, when well regulated, excellent means of forming the understanding, and directing it in the search of truth; but they are not the necessary nor the only means. Nature and habit without rules are often sufficient to attain this end: but who will pronounce any

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rules useless, because some by peculiar happiness are able to do without them?

POLICRITES.

I find I may without prejudice grant to you, that there is some connection between the arts: but this concession will only increase my doubts, and your difficulty in satisfying them, about the possibility of the attainment. You look as if you would have every scholar invested with all the arts and sciences, and compleat in himself, like the philosopher in Tully, who had no part of his dress but what was of his own making. Besides, the principal part of your undertaking is still in arrear; to shew what a lawyer has to do with them: and for that reason I was willing to spare you some trouble in examining every article of your account;

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but I expect you should make me amends on this head; otherwise I shall persist in my intention, and leave you to enjoy your Greeks and Romans by yourself. And at present, I shall rank in the same number, as foreign to our profession, the study of antiquities, classical learning, and all your admired arts; which however connected with one another, have little or nothing to do with the study of the law.—But I still lay open to a rational conviction, if you have courage to undertake it.

E U N O M U S .

I hope in most of these to give you some satisfaction, and to send you away better pleased with your own profession than you came here; for it must be rather difficult to give up what you seem once to have so much admired.

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Besides attempting to prove even this connection in the abstract, as I did the other in some measure ; there are many topics (I flatter myself) that can be more forcibly applied here than in the other case. No doubt you will laugh at me, if I should think of giving acts of parliament in evidence on this issue : or refer you to your own report books in support of part of my argument. I shall even go so far as to produce you some illustrious examples (as you called them) of this union ; and part of my scheme will be executed by reminding you of some books, which those of your own profession have obliged the world with ; and which bespeak an acquaintance with some of those arts you now dispute the use of.

§. 8. When you called upon me to produce instances in our Profession of those who had in themselves connected

law with other sciences, you did it (I imagine) rather with an air of opposition than of real doubt : and as if you would triumph, without a victory. Can I suppose you are unacquainted with the undoubted evidence, many of the greatest lawyers have left in works of this kind ? Must I remind you, for instance, how Hale explored the depths of divinity, mathematics, and history ? How the history of Utopia holds up in the mirror of fancy, the picture of a well policed state, its arts, its laws, and government ? Or am I to repeat to you a catalogue of Lord Bacon's writings, before you will hear of him in this respect as " the greatest of mankind ?"

But I think I may conclude, that we have had some who have perfectly understood many of these arts, tho' they have not left or ever wrote a single

single treatise upon any of them. I will conclude this—either if it is attested by credible witnesses; as Addison and Swift both allow of Lord Somer's, for instance,—or if in their writings on other subjects, or their public elocution, such a vein of imagination runs thro' their arguments, such a spirit in their language, and such allusions in their images, that they could no more express themselves in such a manner without having a natural turn for liberal arts, than you can suppose a representation in a mirror without the presence of the object it resembles; or a parody on Homer or Virgil by a person who has never read the passage to which it alludes. But for evidence of this kind, you must read the characters of historians; tho' in this respect tradition is often perhaps a more faithful register than history.

After what I have offered, and what you may collect on this head, I don't know whether it will be too much to say (as Finch has said) "that the sparks of all sciences in the world, are raked up in the ashes of the law."

POLICRITES.

Oh no; it is rather saying too little than too much, every thing considered: Finch himself, indeed, is a little too narrow in his premises, tho' he makes up for it in his conclusion. If I remember right, he rests the connection of the law chiefly with the arts of logic, grammar, and such dry speculative systems. But the more ordinary and familiar occurrences of life, are not without contributing their quota of legal knowledge. Thus for instance, the sage Littleton deduceth the

the very name and nature of bringing estates into hotchpotch from a "pudding," and gravely informeth us of the reason of the name, because (saith he) "in a pudding is not commonly put one thing alone, but one thing with other things together." And nobody unacquainted with our good old writers, master Bracton and master Briton, would imagine that so common an object as a bowl rolling down a hill, might lead us to a true theory of descents of inheritances; for the singular circumstance in our law, of estates never ascending to the father, is accounted for by them from the law of gravitation. And then how much must we be interested in the study of natural history, to trace that exact similitude, Lord Coke tells us (from the parliament rolls) is subsisting between an elephant

elephant and a member of parliament. Happy for our good country in this respect, that the law has established it as a maxim "that no simile goes upon all fours."

Just about this part of the conversation, a pleasure boat was going along the river, and the music was playing; which echoing from the rising hills, and softened in its progress over the surface of the water, agreeably surprised the two friends, and for a few moments interrupted their discourse.

But Eunomus taking advantage of the incident that occasioned the intermission, asked his friend, whether he thought Music an enemy to law?

POLICRITES.

§. 9. Its not being an enemy only, will not answer your purpose; the question

question is, what connection has it with law?"

EUNOMUS.

The same connection, I should think, that good spirits and a calm unruffled temper have. And tho' it is not every body that loves music; or if they did would it be worth while on all occasions to send for a musical instrument to recruit the exhausted spirits, or restore the tone of mind when destroyed by an intense application; yet I question whether the effects of music, (so common and improved as it is in these times) are not still so great as to make the accounts of the Antients less fabulous than they may seem at first notice. But I will maintain, that you will still find as much use of your instrument as you did before.

POLI-

POLICRITES.

Whether I shall have time to use it as much as I did before, I cannot tell; but I shall scarce fling it away, and so you may save yourself any farther trouble on that point; and proceed in your journey; for you have a great way yet to go.

EUNOMUS.

Well; but in the last article you have granted me a little more than you think for. Have not the Poets (from Homer to his friend Pope) at least as much pretensions to your esteem, as Handel and the musical tribe have? But the amusement from the one source is not transient, as that from the other; it refreshes and it improves; it is retained in the memory,

memory, refines the imagination and augments the treasure and powers of the understanding. The former compared to this, is like the smell of a flower, which however pleasing, is a short gratification of the senses only: whereas this, like the delicacies that strike the palate, when digested, becomes the fund and matter of nutrition.

§. 10. But in barely mentioning the name of Homer, I am put on recollecting a material advantage, that Father of poetry, as well as many of his descendants, will afford to lawyers: — those I mean, who either trace the great fountains of justice up to their head; or pursue the rivulets derived from thence in the innumerable channels of political institutions. Homer alone is a master in both respects. As to natural notions of right and wrong,

and

and the most elevated sentiments of morality, the fabled waters of Helicon were scarce purer than his writings. And those who are at all conversant in Grecian antiquities, know that many of the ancient laws of Greece are preserved in both his poems. Could it indeed be imagined, when something in almost every art may be learned from Homer, that the great arts of government and legislation alone were unnoticed?

- I might on this occasion remind you of Terence, who besides the utmost chastity of style and lively portraiture of manners, for which he is so famous, has, in copying Menander, preserved many fragments of Athenian law. But instead of running over passages, or even the names of Roman poets, who have materials of this kind, I will appeal to the many eminent
has 2 writers

writers of natural and civil law for this century past, for the contributions they have levied on the poets and orators even for the materials of their subject; exclusive of the refreshment they afford; and which Tully insists is so necessary to a mind fatigued with the wrangling and jargon of courts. In short, it would be no difficult matter to furnish out a poetical code; which need not, however, exceed the Corpus Juris, or our own Viner's abridgment.

POLICRITES.

I must own I have as yet fondness enough for the poets, to prefer a quotation out of Homer or Euripides by way of amusement to a string of cases out of the Reports; and the Greek type, in my eyes, is at present more agreeable than the Gothic letter. But my judgment is not to be corrupted

rupted by my imagination. I do not want to be told that the poets can entertain or instruct in matters of ancient story; but what have these things to do with an English lawyer? You may as well insist upon my making collections of pictures, coins, or fossils.

EUNOMUS.

I shall scarce insist upon your spending your estate, and flinging away your time under a notion of improving your taste. Not that I would have you imagine such collections useless to any one, because it might be improper to make them at his own expence. I should be very sorry that you should be at the pains of hunting over all the records in the Tower, and wear out your eyes in transcribing them. And yet, what collections are more valuable in our profession? In
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all these cares you must avail yourself of the diligence of others; or spend your life in heaping up materials which you can never be able to make use of.

POLICRITES.

I begin to see a little clearer the limits of your scheme: for as you do not make it absolutely necessary for me to collect the curiosities of my own country, you will probably dispense with my being acquainted with those of others in person. I was afraid I must have made the tour of Italy, ransacked Herculaneum for antiquities, measured the Pyramids, or have been sent on a pilgrimage to the Holy Land.

EUNOMUS.

No;—it is not every body, that like Scriblerus, is to make “his own legs
“his compasses.” You must be con-

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tent to travel by description, and worship the echo without expecting to hear the first report. What did your favourite Ulysses more by twenty years travel, than observe “*αἴετα δὲ*” “*ποὺν ἀνδρῶν?*” The first may be done with some profit, less time, and with less danger, by reading the accounts of others. Suppose that your own experience would have made a deeper impression on the mind: and that the accounts of others are often imperfect for want of previous qualifications in those who make them; then it will follow, that persons must be qualified to improve by travelling as well as any thing else. And that circumstance alone is sufficient to shew, that those who would travel to any purpose must be disengaged from employments at home. Besides, “men and manners” lay open to observation in one spot as well.

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well as another; and no way of life, I think, can see more of them than your own.

POLICRITES.

You put me in mind of your own river; that reflects every flower that grows on its border: there is scarce a book in your study but I suppose you either have or will allude to in your discourse. How comes it all this while, I have heard nothing of my admired Tully, (as you was pleased to call him) and of those "who fulfil'd min'd over Greece," to use the words of a poet*, that I may shew you have made some progress in my conversion.

EUNOMUS.

§. 11. I thought the Orators, both of Greece and Rome, had long before

* Milton's Paradise Regained.

this spoke for themselves; and I, by any recommendation of their art, should have been in the condition of Plutarch's Sophist, who after having made a tedious harangue in praise of Hercules, instead of being thanked for his pains, was asked, who had said any thing against Hercules. The Orators of Greece and Rome are qualified as well as the poets to entertain in their turn: the poets, we are told, were their fathers; the likeness is still visible. The latter often resembling the language and turn of sentiment of the poets; and they in their formed speeches, exhibiting the best examples of oratory. The speeches of Homer, Virgil, and Milton, have an advantage, which there is much reason to regret the loss of, in the remains of ancient orators: they in many instances contain a complete debate; and the sub-

ject is discussed with all the acrimony and invective of a spirited reply. This example has been copied by the ancient historians, who to introduce specimens of their eloquence, have indulged a vein of fiction under the air of truth; and composed speeches for their heroes, suited to the occasions and characters they sustain. And who is there, tho' he knows them to be fictions, tho' in the severe eye of criticism they are so many violations of historical truth, that would be deprived of those excellent strokes of eloquence, we meet with in Livy or Sallust, Xenophon or Thucydides?

Orators have so near a connection with our profession, that if your knowledge, as a lawyer, is to go any farther than your own breast, (and sure, *scire tuum nihil est*—for what is a lawyer without clients, and) how

can you hope to communicate it with strength and perspicuity, without some assistance derived from that quarter? Persuasion is commonly the effect of art; and it is an art necessary to be cultivated by lawyers, because their clients, always in opposition to each other, can never have the right and justice of the case in favor of both.

POLICRITES.

I hope you would not compare a wrangle in Westminster-Hall, to a weighty debate in the Roman Senate? Or mistake your own constitution so far, as to think that your orators at the bar are to make law just as they please. They may, and I believe often do, give proofs of their eloquence, by speeches of an hour long; and a reply as long again. I could tell you of those, who, in Shakespear's phrase^b,

^b Merchant of Venice.

“ speak

“ speak an infinite deal of nothing.”
But from the little that I understand,
the cases and acts of parliament must
at last speak for themselves.

EUNOMUS.

As clear, settled principles of law,
I agree with you authorities cited are
never disputed or disputed in vain. But
is their authority always so settled; or
their meaning so clear and determined,
as to admit of no altercation? Is there
no difficulty in connecting them to-
gether, in such a manner as to adjust
them to the complicated circumstances
of the case in question? Or when the
law and the fact are ascertained, is there
no room upon some occasions to apply to
the discretion and equity of the Court?

I am a little surprised, however, to
hear one that talks of the Constitution,
entertain so mean a notion of West-

minster-Hall. Have not Englishmen lives and property to defend as well as Romans? And you must needs know they are as jealous of attacks on either.

I will not go so far as to think their opinion worth an answer, who hold, that modern times are strangers to, or rather will not bear Eloquence: because I think they are sufficiently refuted by fact. And the notion is as destitute of sound judgment, as it is contrary to experience. Nor do I think the notion of others is better founded, who maintain, that an English bar will not admit of Eloquence, being of a nature extremely different from the course of judicature in Athens or Rome: from which as we are supposed to be acquainted with the only true models of Eloquence; so the circumstances of former times and different forms

forms of policy are thought to exclude all others as much from the application of eloquence, as from a competition with the great orators of those days.

I am speaking to one who knows from history and his own experience, that even here the fact is directly otherwise. But was I to borrow no argument from experience, it would be enough to say in general that Eloquence is the common child of freedom and of knowledge: that in any State, where the maturity of its learning keeps pace with the freedom of its constitution, men must have constant opportunities, and they will be able to make the best use of opportunities to persuade or refute; will find ample field for panegyric or satire; will be able to raise or overcome occasional opposition. All which are no other than the various modes and characters

acters of eloquence conceived in the abstract. Nor as to the particular application of it to our profession, should I think those would have very firm ground to stand on, who would argue, that in a constitution governed by law, particularly in the very course of expounding that law, or debating on it, there can be no room for the free use of genuine eloquence. Such as, according to the true idea of it, may command the passions while it silences the judgment; may bear down all opposition, and carry every thing in triumph before it.

To explain myself, I will not scruple to say, an address to a Jury is the field for eloquence; as an address to the Court is for argument. And thus (however they may accidentally intermix) the provinces of strict reasoning and of eloquence, as to the present application

application of them, are as distinct from each other, as law and fact are. Nor yet would I scruple to allow, that in our books much fewer instances occur of Eloquence than of Logic, tho' I am contending, that the same Profession is a school for both. The reason is, one is a dry independent art that borrows no assistance from occasion, time, or place : the other is so much indebted to all these, and above all, to the form of expression and the manner of the speaker, that the best account of it at second hand, compared to its original exertion and influence, is like a print done from a painting of Titian's or Claude Lorrain's ; which may be correct enough, perhaps, as to copying the design, but must be stript of the peculiar excellence of the original, its warmth of colouring. And thus it is, that tho',

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for instance, the elements of Euclid, or some pieces of Aristotle's, are the same to us as they were to those of his own times; the remains of Tully or Demosthenes are not. With these allowances, I may venture to add, that some few specimens in the State Trials may be looked upon as excellent instances in this Profession, both of argument and of eloquence: tho' I confess for the latter, it is always better worth while to consult the times, than any books whatever.

When I speak of the times, I am tempted in some measure to vest my appeal to the present. For how can we reason better, than from what we are best acquainted with? I have intimated, trial by jury is the proper scene for eloquence. And, I think, in this view I can remind you of the most distinguished characters of eloquence,

quence, that all occur in one single field of action. Of which, if any particular character should be surpassed in other quarters, yet I am sure no other quarter can produce so many together, and so totally different from each other.

The first in order, is a speaker of so uncommon a flow of true natural humour, assisted by great experience and observation of the world, that none but the object of it can refuse to join in the laugh: a second, copious, fluent, and insinuating: the next, a nervous and learned speaker, and on occasions a master of the most strong and liberal irony: a fourth excelled by none for solid knowledge of his profession, with a clear, strong, and manly style of expression. Then comes another, whose peculiar excellencies, as a public speaker, if I was to give
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my own opinion of, I should, without a moment's hesitation, refer to his surprising subtilty and imagination.

After these, if after these, (who are the greatest constellation of orators in our profession, that adorn *any one particular spot out of Westminster-Hall*) it was necessary to look out for a single character, the most perfect in its kind; there is but one that I can remind you of; who, as he unites in himself many of these peculiarities, so the trial by jury, as much distinguishes even him beyond any other exercise of his abilities, as it does in this respect distinguish him from all others; who is confessedly allowed to be with ease the greatest nisi-prius lawyer of these days; if he was ever excelled, or even equalled in any other.

These few characters, tho' faintly drawn, yet I hope with some degree

of likeness, are sufficient to shew our profession has, in its own peculiar province, some pretensions to eloquence. Besides, those who have acquired eminence in this profession, seldom confine themselves to the duties of this alone. The figure they have always made in their own senate, shews the use of eloquence more than any thing I can suggest to recommend it. And tho' their inclination or their opportunities may not always lead to politics, I mean the care of this kingdom, considered with respect to foreign measures, its commerce or its allies, yet sure, under the notion of a legislature, none are more proper to attend and advise the making of good and useful laws, on which the very being of a state depends. Turn to any period in your own history, (you will scarce deny the use of history)

you

you will ever find some illustrious persons sustaining the united characters of lawyers and statesmen.

POLICRITES.

§. 12. So far from denying the use of history; English history I mean; that in my opinion, if any thing has a direct and immediate connection with law, it is this. I rather wonder, so little of this kind has been left us by persons of this profession. For who can be supposed to be better acquainted with the constitution, than those whose province it is to defend it in so many shapes; and who, from the nature of their station, are most conversant in records, the pillars of history? And who, from their acquaintance with evidence, the manner of stating facts distinctly, and examining what is or is not probable, can better fill up the draught

draught of history as it is left us by one of the best judges of antiquity? Nequid falsi dicere audeat, nequid verum audeat.—Perhaps it would be a slender commendation, where the track itself has been so little frequented in this Country, to say the nearest approach has been made to fame, thro' this avenue, by those who stood foremost in our Profession. I think I need not explain my meaning by mentioning the histories of Henry the Seventh, and the civil war. That this track has not been more frequented by some of the same set of men, may be imputed to their want of leisure; in some measure to a delicacy perhaps, in declining to relate transactions, in which their own part, tho' often considerable, was only short. But in general it is much to be lamented, that in this Country, immortality of reputation,

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tation, which is one great spur to actions, and wisely made perhaps, “the last infirmity of noble minds,” is after all left at the mercy of obscure and private historians. We have few Xenophons and Cæsars; few who penned memorials of the times in which they lived; and described the scenes in which they acted themselves.

EUNOMUS.

I wish by your own example you may increase the number; your opinion of history, I see is already strong enough to excuse my silence, as to its profit in your own Profession. I will only make an observation that occurs to me at present, with regard to some circumstances that I think more particularly useful to this end.

P O L I-

POLICRITES.

The only point in which at first hearing I have agreed with you, throughout your argument, was so far from being intended to stop you in your observations, that my curiosity and want of information in this particular will make me listen with more pleasure and attention.

EUNOMUS.

§. 13. I only wish you may not repent of your encouragement. As the chief use of history is to teach by examples, I think the drawing characters ought to be well regarded by historians, as it is the clearest manner of exhibiting examples. There are but two methods of doing this: either they introduce the persons into their history by drawing his character pre-

vious to the relation of the events that form it; like the δ $\pi\rho\omicron\lambda\omicron\gamma\iota\zeta\omega\nu$ of the Greek plays, (so strangely perverted in our times): or they kill him first, and then, after the manner of the Ægyptians, scrutinize his conduct. The use of drawing characters is confined only to the principal agents; subordinate instruments are not of sufficient importance to merit such care of the writer or attention of the reader.

In both cases you will easily allow there is this justice due to the person from the historian “in drawing the character corresponding to his actions,” that is, such as his actions taken together may warrant. In the language of our profession, the character is to be considered as a verdict founded on the several actions related by the historian, all of which are to be admitted in evidence. And the reader is to judge,

judge, whether the historian has given a true character, upon a supposition that all the evidence the historian had, is laid before the reader; for he can decide whether the character is drawn agreeable to that evidence.

But in the first case, writers often, in treating of their own times, give characters from their own personal knowledge; and consequently, they may have evidence which is not laid before the reader, since the general character may have been formed by his cotemporaries on several actions, which make no part of the history; it may be the result of private acquaintance in private life. In such cases it is no impeachment of the justice of the historian, if the actions related do not come up to the character assigned the agent: it is sufficient in the main, that they do not

contradict it. The character in these instances, is previously inserted as an explanation of the subsequent actions; and they teach us to examine the judgment of the historian in the account of those actions; since by being previously made acquainted with the character, we shall know whether the motives assigned as the causes of particular actions are just, by their corresponding with the general character. This method, you know, is common with Lord Clarendon, Burnet, and Swift.

§. 14. Among other modes of searching history, the study of comparative history seems of great service. Our knowledge in general, is not so much increased by an accession of new ideas, as by comparing the ideas we already have. In the same manner the knowledge of the Constitution is advanced
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by comparative history; that is, by comparing similar events in the course of history; and by comparing the different accounts of the same event by different historians. The latter tends to establish facts, as the other does to apply them. It is little more than idle curiosity, to treasure up facts without applying them; but it would be dangerous to apply them to other cases before their own credit is sufficiently established.

§. 15. I think there can hardly be any doubt that history is of great use in studying the law of nations: indeed hardly any point can arise in the law of nations, but what may be proved or illustrated from thence. And the reason is plain. The custom, usage, and practice of different nations have, in many points that are indifferent in themselves, and not of

natural obligation, been considered as the law of nations : and it is the business of the historian to record this practice and usage, as far as it is connected with his proper subject. But when the law of nations is considered only as the law of nature applied to societies, and so extends the obligations from nation to nation, which arise by nature between man and man ; the use of history is less absolute ; and the examples it gives are to be considered not as proofs, but illustrations only. The reason is likewise plain : because in this case it is the business of history, “ to find the fact and not the law ;” the eternal difference between virtue and vice, will render the quality of an action under given circumstances, precisely the same in all ages. And therefore the number of examples in history to
any

any one point, will not create law in this respect as it does in the other. And this difference must ever be attended to, or history will mislead reason by false colours.

There is a natural connection between "law and fact;" I would almost venture to place them among Mr. Locke's inseparable ideas. The latter undoubtedly gives rise to the former, considered as positive institution: for there are few things a legislature can foresee before they happen; and the latter scarce ever do happen, but the mind, in its survey of them, calls in the assistance of the former (the former I now mean in a more extended sense) by enquiring whether what has been done, is agreeable to the natural notions of reason, or the deductions of reason applied by positive

tive laws to the convenience of society.

There must be the same connection between "law and history," that there is between law and fact: for whether we hear of the facts or read of them in history, can make no difference; we judge of them by the same rule in either case. The historian indeed has it in his power to help us to form this judgment: and you well know this has been laid down as a rule for writing history; and the best writers (who in reality in all arts furnish the rules) have complied with it. It is this that distinguishes Livy, for instance, from the "Annales Pontificum," the early form of history, which you may imagine was as dry as a parish register, or at best on a level with a Gazette.

§. 16. But to apply this reasoning more particularly to our subject; the connection between the law of England and the history of England, is founded on their reciprocal uses to each other. And the use of history to law, is evident in these particulars among others.

1. In giving the proper weight to written evidence, by enabling us to consider the times of which it bears witness. Written evidence is of the highest use in matters of the greatest consequence, whether public or private in their nature; in questions of antient right, prescriptions and the like. And the written exhibits, produced either on the same side as parole evidence, or opposed to parole evidence, can never have their true force computed, without considering, besides many internal circumstances,

(as their nature, how preserved, in whose custody, &c.) the state of public affairs at the time they bear date: and likewise in many cases, the intervening history to the rise of the question; because the temper of the kingdom, the prevailing notions (as I shall have occasion to observe) often temporary and unconstitutional; the peace or disorder of the times; compared together as the subject requires, will best account for many things of this kind. And this comment of history on old instruments and exhibits, serves the same purpose as cross examination does on the testimony of living witnesses, it sifts the truth, and separates the dross from the ore.

2. An infinite number of questions receive the only light they are capable of from the reflection of history; in a different view, I mean, than
that

that already mentioned, of controuling written evidence. In cases of private property, as tythes, customs of places, manerial rights, &c. in these and many other particulars, it is necessary to know the original of the matter in question, what the present state of things succeeded, and what has been its progress. History too in this case will not only explain subsequent laws, but will supply the silence of law itself.

3. History, well attended to, will furnish useful observations, and a kind of criticism on law books themselves, with regard to their doctrine. For our reasoning in this respect may be extremely fallacious; and mistakes may be of the worst consequence. We take a Report Book in hand suppose; the case we consult is extremely clear perhaps, and consistent with itself;

self; but the doctrine startles us as remarkable. We therefore look into a cotemporary report: here too, suppose, we find the same doctrine grounded on the same circumstances of the case: and the credit of each report is confirmed by its consistency with the other. But if the credit of the doctrine itself is in question; we must look into the times; consider who were the Judges, inquire into their character, in particular, from history; and see whether it was a time, when the “little finger of the law was heavier than the loins of the prerogative.” Or whether the servility of the times was such, that the case was inverted in favour of the prerogative.

The times, I say, will explain law as well as facts. It is in this view only, and with the comment of history,

tory, that we understand the doctrine (for instance) laid down by a Chief Justice in support of a dispensing power, "that the laws of England are the King's laws—that it is his prerogative to dispense with them on all urgent occasions, of which he is the sole judge—and that this right is not to be taken from him." The Chief Justice, however, argued logically, tho' not legally: allow him his principle, that the "laws are the king's laws," and his conclusion will follow, and to much greater extent than perhaps he intended. His principle would soon abolish a Parliament: for to what purpose, in any case whatever, is the concurrence of both Houses necessary to make laws, which it is the King's inseparable prerogative to break through?

Or

Or can there be a more detestable prostitution of that lawful character, than to be of opinion (as there were it seems some of opinion in 10 Rich. II.) that it is treason in a Parliament to proceed on any business in an order contrary to what the King may appoint? No wonder the same men, at the same time, maintained it was treason in a Parliament to impeach a Judge for his offences: no wonder too, that the Parliament afterwards refuted this opinion by impeaching those very Judges, and sacrificing them for their corruption.

One is rather more shocked at these doctrines, when they apparently affect life, than when they only aim at the invasion of property. What can we say, to find it held in construction of an act, "requiring two witnesses for treason," that one witness of his
 4 own

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own knowledge, and another by hearsay from him, tho' at the third or fourth hand made two witnesses or accusers within the act. And yet this, every man (says a very honest and learned Judge) " who will do so much
 " penance as to read over the state
 " trials during the reigns of Queen
 " Elizabeth, and King James, will
 " find to have been the doctrines and
 " practise of the times."

The truth is, making Judges the mere tools of the crown; and setting one Judge to tamper with all the rest, to know his opinion before hand, and sometimes to direct it, has been in distant times too much practised to make any unconstitutional opinion at all, unexpected from men who were not secured by good principles of their own. For while the Judges were entirely dependent on the crown;

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and

and the crown itself was on the heads of weak or misguided princes, bad men, when placed on the Bench, must have been more liable to temptation; and the Constitution, ever in some degree at their mercy, more liable to a wreck, than when their seat, to the immortal honor of this Reign, became fixed for life; and the crown, as it now is and has long been above those mean and dangerous practices of corrupting the fountains of law, merely to give the most odious colours to temporary opposition.

I know not how I have fallen into a digression of history, when I intended only to shew the connection law has with history; I will only further observe, that you may find too in the course of history, that the times will account for the particularity of laws themselves, as well as opinions

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on laws. It is equally true of all times, perhaps, what Chief Justice Vaughan said of the æra of acknowledging the King's supremacy—"that laws were then made, which in the circumstances of another time, would not have been made." It is in a manner the genius of positive laws, to be called forth by particular events; and it is from hence they principally differ from the laws of nature, which are universal and immutable.

POLICRITES.

You have more reason to expect my thanks for your digression, than I have your apology. But I would not have you imagine what you call prolixity in this respect, will excuse an omission in another. You have, according to your own division, handled only one part of the question: I expect now

to hear what is the return made by law to history.

EUNOMUS.

Very ample returns indeed; if from hence history borrows its best materials; as you rightly observed by calling records, the pillars of history. And who can doubt but from this quarter, in the most extended view, the greatest events are to be looked for? Such as are most remarkable in their nature, and are the genuine, tho' secret causes of things that make more noise indeed in the world, and take up more room in history. Victories and triumphs, it is true, make a deeper impression on common minds; but their laurels fade almost as soon as gathered. Treaties and alliances (which as contracts are objects of law) are connected

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connected with wars; but neither treaties, nor wars arising from them or producing them, deserve to be remembered, unless entered on in defence of our rights. Turns of policy are to be referred to the same standard. And it is amazing from what seemingly inconsiderable causes (in questions of a civil right) some of the most extensive schemes of policy have either been produced or promoted; that have been at length like rivers falling into the ocean; tho' their source was at a great distance, and so minute as to be scarce discernible. I need not remind you of the case of ship-money; or the foundation that was laid for the dispensing power in the trial of a private recusant; and the visible effect that had in the revival of popery; till in the end it produced the Revolution. All these cases

M 3 shew,

shew, how much (as I before hinted) it lays in their power to preserve the Constitution; whom the Constitution has made the guardians of its laws.

But I have been too long in these observations, considering I have as just a claim on your attention in other respects. Our Profession, tho' principally that of the common law, (and I hope you will always consider it as such) is not however averse to the study of other laws, to which, under the denomination of the common law, that is, (in my present meaning) the laws of England, it here stands opposed.

§. 17. The law of Nature not only should be studied as the ground of the great and fundamental laws in all societies; but, because the "state of "Nature" itself does still subsist in many

many respects, notwithstanding the existence of society.

1. It is plain different states with respect to each other, are still in the same condition that different men were in before any society was form'd; that is, naturally equal and independent. That natural freedom subsists in all cases, where it is not abridged by a mutual and voluntary treaty. Nay, even a violation of treaties, as well as an invasion of natural rights, must be avenged by natural means. No other state has a right to determine their differences upon an appeal; and if any state interposes without mutual consent, it justly risks the enmity of the one, by adopting the cause of the other.

2. But even in any particular society (governed, if you will, by as excellent laws as our own) the state of

nature must in some respect subsist between the members. It must subsist in all those cases, where the laws of the community cannot be appealed to. And hence it is, that all governments have allowed of self-defence in those cases, where the laws made for their preservation, cannot be appealed to till it is too late.

This right of self-defence in cases of extreme necessity, that remains in any one man after the existence of society, has, you know, been applied (as it may a fortiori be applied) to the right of the whole body of men in a society, to defend themselves against a tyranny of its head.

It is on this principle Mr. Locke so nobly vindicated the Revolution from the clearest dictates of natural reason. His treatise is one of the most solid pieces of reasoning, and at the same time

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time the most artful vindication of the public measures at that time. It is like those mathematical lines which come infinitely near a curve without ever touching it: you see in every step a defence of the Revolution, tho' the Revolution is not so much as named. It was his business to reason only from principles: the particular case he knew would apply so close to those principles, that the passions might be taken unawares, while they were asleep. Whereas, had he constantly kept the event in view, and reasoned upwards from the event to its cause, so many little views of party or interest, would, in his time, have mixed themselves in many readers enquiries, that reason might in the end have been silenced; and the passions have got the better.

The

The opposers of his doctrine, the advocates for hereditary, indefeasible right to the Crown, must clearly exclude the notion of a trust in him that wears it: a trust so high in its nature, and ever so strongly recognised in the oath of every one that wears it. These gentlemen must, I say, exclude this trust, and consider a right to the Crown, like any other species of mere descendible property. And then, to be sure, they argue well, tho' on the same narrow rules of law, as they would about the title "of a pig-stye or a lay-stall," to use the expression of a great advocate for civil liberty: an absurdity not less than what Addison exhibits in an imaginary drama, of some young lawyers at a coffee-house, settling the succession to the French monarchy by their own statute law.

3. But

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3. But there are things likewise, as well as persons, that still remain in a state of nature: not being subject to those rules of property that civil states have established as to other things. Such is the ocean and the fish in it—the water of a river—Birds of an untame nature—the right of enjoying the common light and air; and hence, in many cases, remedies are given by our law, for obstructing the one and corrupting the other.

4. Nay, there are some regular assemblages of men, under the appearance indeed of society, that either with respect to the rest of mankind, or with regard to the individuals that compose them, may be still deemed in a state of nature; little more than mere occupants of the spot they inhabit; and united by no civil ties, laws, or contract. Many writers rank the Piratic states

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states of Barbary in the first class; as Mr. Locke does all absolute monarchies in the latter. His argument, if I remember right, is, that it is the business of society to appoint some common rule, which may be appealed to in every man's case; that no man may be a judge in his own, as he must be in a state of nature. And therefore, in any government, if the will of a prince is so absolute as to admit of no appeal, all his subjects are still in a state of nature; with this difference, that the Prince, instead of judging (and perhaps judging corruptly) in a case really his own, may make every case his own; and decide, without law or appeal, the case of every person in his dominions. And with this further difference, that a person in a state of nature, indeed, is exposed to the arbitrary power of all he meets with; but

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but in a despotic government, he is exposed to the arbitrary power of a single person, who has an absolute command of many thousand men to enforce obedience to his will. Think of this, and bless yourself; you are born neither a Russ nor a Turk.

§. 18. The civil and canon laws are not to be forgot, as part of our scheme: and both these, as in many cases they furnish the grounds of proceeding in the temporal courts, in many instances are still used; and the jurisdiction of courts proceeding by their rules, often devolve upon the common law Judges, are evidently connected with the study of our law.

POLICRITES,

I give very little credit to general assertions; and so be pleased to take a little trouble to explain yourself, as you
are

are sure to give me a great deal if you do it with success.

EUNOMUS.

You will very easily understand the necessity of regarding each in its turn, if you consider what I shall advance in respect to each.

And first as to the Civil Law. Many of our antient writers, it is well known, often adopt the terms and reasoning of the Civil Law. I grant, for this reason they ought to be studied with caution; and to do this, you must know, when and from whence they borrow their notions. I agree with a learned Judge, "it was no wonder that Bracton, (for instance) who was a Doctor of both laws before he came to our bench, having no tolerable system of the English law, then in its infant state, should adopt what he found

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“found in the Books of the Civil
 “and Canon Law.”—But one cannot
 consider with patience, the attempts
 of Cowell in a more enlightened age,
 to form a narrow system of the law
 of England in exact conformity to the
 Roman Institute: or that he should
 be countenanced, nay, encouraged in
 this attempt by the reigning prince;
 who could mean nothing by so doing,
 but, in repugnance of the genius of
 our law, to render himself as abso-
 lute in England as the Emperor was
 at Rome.

It was with such views, we are told,
 that King, openly at his table, prefer-
 ed the Civil to the Common Law; tho’
 in a speech in Parliament, he as extra-
 vagantly retracted his preference, by
 saying, “if he was to chuse a law for
 “this kingdom, he would prefer the
 “National Law, to the very Law of
 “God.”

“God.” And yet (only mind his inconsistency) in the very same speech, within a few lines, he wished for the “settling and amendment of that very law :” tho’ every body knows, he afterwards rejected the best opportunity, that may ever occur, in a proposal of Lord Bacon’s, in conjunction with the greatest lawyers of that time.

The Civil Law, however, in due subordination, deserves on many accounts to be studied by the Professors of our own.

The Law of England often borrows the rules of the Civil Law, in the construction of wills and trusts : the latter was the offspring of the Civil Law, and both are treated by it with great precision and exactness. Our Law too has, perhaps, borrowed, at least agrees with the Civil Law in,
many

many other particulars ; which I will mention in a lump, as they occur to the memory : and I rather do it, because I do not recollect any writer that has done justice to this subject. Such for instance are the *collatio bonorum* and our hotchpot Law—the avoidance of gaming securities—the *Hypotheca* and mortgage—the *Pignus* and distress—taking unlawful distresses in the Roman Law ; and the *averia Carucæ* of our own—expulsion for arrears of rent and the like powers, by 11 Geo. II.—the quasi contracts and implied assumpsits—the *nuntiatio novi operis*, and the *ad quod damnum*—the *noxæ dedere*, and our deo-dand—the *compensatio debiti*, and our set-offs—the oath of calumny in the Civil Law, like the oath with us on exhibiting articles of the peace—the *compromissum*, and arbitration—a

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Judge's

Judge's power of certifying probable causes, like that in the digest—women acquiring nobility by marriage, and losing it by marrying a second husband of inferior degree—the *Jus trium liberorum*, and the like provision in a single instance by a clause in our last Militia Law—a judge in the Civil Law was liable *litem suam facere*; I think we have but one instance of a Judge being fineable for his opinion, which is in the Court Baron: tho' as a Roman Judge, was likewise in the nature of a Juror, as taking cognisance of the fact; the exceptions he was liable to, bear a much greater analogy to the challenges of jurors. There are likewise variety of circumstances, in which the Advocate and Proctor of the Civil Law, correspond with council and attorney of our own.

In

In these, and many other instances, which will occur to any one turning over a system of the Civil Law, and competently read in our own, a pleasing analogy will be easily observed. The comparison, however, may (as it has been somewhere expressed) be more often like a globe and a plane, that touch only in one point; than like two planes which have an intire coincidence.

The difference of the two systems in similar objects, will not, perhaps, be less pleasing to an Englishman, or less instructive, than their agreement in some particulars. And how widely do we differ in laws of proximity; privileges of women; rules of evidence; rights of prerogative; attestations of wills, and institutions of heirs under them? and happy for us almost entirely in criminal proceedings, as well

as in punishment for crimes, and very often the ideas of crimes themselves?

I need not, after these weighty distinctions, mention some lighter shades, such as the revocation of gifts for ingratitude; or in the *donatio propter nuptias*, where the match was broke off; with the extraordinary refinement of allowing the lady to retain half as the price of a kifs.

§. 19. You will think it less surprising, that our law should have any mixture of the Canon than the Civil Law; as the Popes, you know, had a much longer and more absolute dominion here than the Emperors: and tho' while Britain was under the Roman government, it was not altogether a stranger to the Roman Law, yet the Saxon invasion seems in a great measure to have swept it away. It was a mere

accidental discovery of part of it, that gave the whole any footing in the west of Europe: and the times in which this discovery was made, will easily account for its inconsiderable progress.

Indeed, whatever reception it has met with in England, was the effect of silent conformity, not of legislative interposition; but neither the Civil nor Canon Law, could have any real weight here, without a parliamentary sanction. Any attempts of this kind were unlikely to be made in favour of the first; they were made, but they were resisted with vigour as to the latter. Witness the memorable unanimity of the peers at Merton, in refusing to legitimate children born before marriage; as the Canonists would have had them.

We have, however, many points of antiquity, as well as daily practice, from the Canon Law. The primitive institution of our terms, the custom of not going on with the business of terms in the afternoon, the singular conceit of prohibiting Jurors meat, drink, or candle light, till they are agreed in their verdict; Sir Henry Spelman will tell you, are all either the text, or by way of gloss on the Canon Law.

Many rules concerning the church, as to advowsons, patronage, rights of presentation; others with regard to matrimony, privilege of clergy; and concerning testaments, are derived from the same source. Instances enough might soon be produced to justify Lord Vaughan, in saying, “ that tho’ the
“ knowledge of the Canon Law be
“ not an adequate subject to an Eng-
“ lish

lish lawyer, yet it is a subject in
 "common."

I will not stop to insinuate the use
 of other laws, and of foreign writers,
 in many questions, that are agitated
 in our courts of a very liberal nature;
 such as the privileges of ambassadors,
 mercantile questions, nice points about
 the force of our laws in conquered
 countries; or the validity of our own
 laws, when they interfere with those
 of other states. These might be cu-
 rious, but would be too minute parti-
 culars, to interrupt an account of other
 systems, that have in course of time,
 been deeply interwoven in our own.

After what has been said, the law of
 nature and the law of nations, I think,
 may be justly recommended as necessary
 to be studied: they being in effect
 only so many applications of morality
 to a new set of objects. The Civil

and the Canon Laws you will allow me to recommend, tho' on narrower grounds: tho' they are not like the Law of Nature, the common ancestor of all those independent maxims of justice, that are the foundations of all positive Laws; yet, because they are undoubtedly the parents of many particular maxims in our law; and discover a relation by the similitude of features.

§. 20. The same similitude of features, and the same relation have been discovered between many parts of our own and the old Feudal Law. An English Lawyer, if he would attain the true perfection of his art, has, like the painter, his Lombard and Italian schools; our municipal system in its progress, has copied the great draughts in them both. I have already mentioned instances enough in the one, and will just observe from memory, some

some particulars in which it has copied the other. The Laws of Descent still prevailing; and the whole doctrine of Tenures, now in a great measure abolished, are all grafted on this stock. These are points, to which I can call you for many learned and unexceptionable witnesses, by the names of Spelman, Hale, and Wright; that I will neither labour to prove nor explain them.

§. 21. I cannot pretend to say our Law has copied from any other positive systems, than what I have mentioned; tho' it may, and does in some instances, resemble the particular constitutions of others. But consider in the course of history, the variety of invasions this Island has sustained; most of them in their turns productive of Laws; consider, in a happier view, the mixed body of the English legislature,

flature; men various in their talents, their education, their pursuits and connections; many of them improved by an experience and knowledge of other countries; consider all this, and it will be no wonder that the law we live under is as compound as the atmosphere in which we breathe: that the political maxims of other states are adopted and made to conform to the genius of this: and by a kind of legislative commerce, the defects of our natural growth (if such occur) are improved by the importation of foreign productions.

Thus, Policrites, have I sufficiently insisted on the connection the study of the law has with other sciences; whether I have made it out to your satisfaction, you are the best judge.

POLICRITES.

The only doubt I have now remaining, is, in what manner the practice is to come near the theory? Let me hear you a little on this head.

EUNOMUS.

§. 22. I know not whether you mean to crown my labours with a compliment or a reflection: either to suppose I was delineating my own attainments, or that I should have the presumption to lay down rules for acquiring what I will own to you I never expect to attain. In both respects, my friend, you have mistaken the drift of my argument. It is easy to conceive and propose much more than it is possible to effect: and in that light, the conquest of all those sciences, consistent with your own, may, perhaps,

haps, be deemed. I was desired only to explain this connection; I did it to vindicate the law from an illiberal notion, under which you, with too many on your side, had represented it; and to shew that it is a science not only connected with others, but in some measure including them all.

If Tully, who was himself the model of eloquence to his own and all succeeding times, could form an idea of a higher perfection than he could reach: I hope I shall be excused in adding, one may conceive more excellencies than any one lawyer ever possessed: tho' perhaps it ought to be the utmost of one's wish to be able to imitate the examples before us; more may not be granted to man. But the model of perfection here, like the Helen of Zeuxis, is to be formed in the mind by an imaginary assemblage

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blage of the greatest peculiarities of different persons; and so may constitute a happy union, which can no more become visible than Plato's virtue.

To encourage you, Policrites, I need only add, Industry must be your secret: it is really more necessary in this Profession than in any other. You must contrive to live longer than others in less time; and must date life by the application of time, rather than the number of years that barely mark its duration: which may be done by less vigilance than the "sex horas somno" of your master Coke. It has been a prevailing notion in all ages, that a lawyer must rise early. The *Gnavus mane forum*—and *Ad galli cantum*—of our friend Horace, will be good standing lessons: and I don't know why Homer may not speak to a "Counsellor at Law," (as well as a states-

a statesman) when he says

Οὐ χεὶ παννύχιοντ' εὐδ' εἰν βεληφόρον Ἄνδρα.

POLICRITES.

§. 23. But after all, the Law, independent of other auxilliary arts, is itself of such vast extent, that it is difficult to know how one person may be master of the several branches of it. It was this view that raised in me those hasty reflections that you checked in the first origin; and by a very fair induction have proved to be inconsistent with that zeal I endeavoured to shew for my Profession. I could now wish you would ease me of a burthen I still have on my spirits, by pointing out in some degree, the connection that the several branches of the Law have one with another.

But I see you have some company at the other end of the garden, who
are

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are coming this way. All that I can expect now is your promise to entertain me upon this subject another time.

EUNOMUS.

You may depend upon it, I shall readily do all that lays in my power. And you are welcome to my best endeavours the next time you come.

are coming this way. All that I can
expect now is your promise to entertain
me upon this subject another time.

E U N O M U S.

You may depend upon it, I shall
readily do all that lays in my power.
And you are welcome to my best en-
deavour the next time you come.

